

TITLE 18. ENVIRONMENTAL QUALITY

PREAMBLE

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include an explanation about the rulemaking:

Background

Historically, a broad spectrum of Arizona’s lakes, ponds, streams and wetlands have been protected under the Federal Clean Water Act (CWA). This protection includes the regulation of discharges of pollutants to surface waters via the Arizona Pollution Discharge Elimination System (AZPDES). This regulatory program has only been implemented to regulate discharges into “waters of the United States” (WOTUS).

The CWA does not define WOTUS, instead, it provides discretion for the U.S. Environmental Protection Agency (EPA) and the US Army Corps of Engineers (USACE) to define WOTUS in their rules. Courts have heard a number of cases and issued rulings that effectively modify the extent of federal jurisdiction and different Federal administrations have attempted to change the definition as well. The Arizona Department of Environmental Quality (ADEQ) created the Surface Water Protection Program (SWPP) to provide clear and consistent regulation for stakeholders despite these changes to the jurisdictional reach of the Federal CWA. The SWPP is the result of a rigorous public process that has resulted in this effort to create a radically simple but effective approach to protect important state waters that are not WOTUS and therefore would not receive the protections of a WOTUS.

HB2691 (2021) directs ADEQ to develop the SWPP and establish a variety of regulations by December 31, 2022. ADEQ is meeting that goal in this publication of the register by amending the proposed Title 18, Chapter 11, Article 2 titled “Water Quality Standards for Non-WOTUS Protected Surface Waters.” This specific rulemaking modifies Title 18, Chapter 9, Article 9 which contains the regulations for the permitting program.

Permitting

This proposed rulemaking includes modifications to A.A.C. Title 18, Chapter 9, Article 9. Large portions of the permitting provisions in HB2691 are intentionally self-executing. ADEQ does not intend to meaningfully modify the AZPDES permitting program in this initial SWPP rulemaking, although the need to do so may arise in later rulemakings.

There are currently no permitted discharges to non-WOTUS protected surface waters. The cost of building a separate permitting program will issue no permits in this initial adoption is prohibitive as ADEQ would not see environmental benefits from adopting entirely separate provisions nor would the agency reduce permitting costs.

7. **A reference to any study relevant to the rule that the agency reviewed and proposes either to rely on or not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each**

study, all data underlying each study, and any analysis of each study and other supporting material:

None.

- 8. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable.

- 9. The preliminary summary of the economic, small business, and consumer impact:**

A. An identification of this rulemaking:

The rulemaking addressed by this Economic, Small Business, and Consumer Impact Statement (EIS) contains amendments made by ADEQ to 18 A.A.C. 9, Article 9, in order to adopt and revise Surface Water Quality Standards (WQS) within the State of Arizona. Additionally, this EIS addresses the adoption of 18 A.A.C 11, Article 2, which adopts WQS for non-WOTUS protected surface waters listed on the Protected Surface Waters List. The WQS in Article 2 do not apply generally and may only be applied to listed surface waters. The rulemakings are co-published in this version of the register.

B. A brief summary of the EIS:

Interested stakeholders should review ADEQ's Social, Environmental, and Economic cost/benefit analysis technical paper at azdeq.gov/node/8173 for more in-depth information. ADEQ's contractors have drafted the paper to meet the statutory EIS requirements. Additionally, ADEQ has also addressed this topic earlier in the preamble and provided specific information regarding the costs and benefits of this proposed rule.

The three case-study waterbodies ADEQ has used to in this rulemaking provide a contrasting and otherwise informative set of examples by which to illustrate various aspects of the economic impact of this rule.

McClure's quantitative analysis based on the data available for various cost and benefit factors incorporates a framework for addressing additional, qualitative aspects of protecting Arizona waterbodies. These qualitative components add context to the quantified portion of ADEQ's analysis and reflect potential elements of the cost/benefit analysis that could be refined during formal rulemaking. Including these qualitative discussions also helps illustrate certain limitations in the current modeling process.

The quantitative elements synthesize the following types of information:

1. Key characteristics of the three case-study waterbodies for which the cost/benefit process will be performed and which influence the application of various cost and benefit factors.
2. Quantified cost and benefit factors to apply to the waterbodies and to the households in the two types of analysis areas.
3. Factors for updating cost and benefit estimates derived (by others) in preceding years and for discounting streams of costs and benefits estimated to occur over a subsequent 20-year period.
4. Cost and benefit totals for each waterbody, and the ratio of benefits to costs.

Qualitative aspects of the analysis are summarized in the contractor report through a series of tables that discuss the broad implications of additional benefit and cost categories not quantified in the current model, Environmental Justice observations based on the quantified demographic data, and the sensitivity of model results to various quantified variables, including how results compared to certain Arizona-specific cost and benefit estimates in the EPA document.

C. Identification of the person who will be directly affected by, bear the costs of, or directly benefit from the rules:

The table below summarizes the persons who will be directly affected by, bear the costs of, or directly benefit from the rules in a manner consistent with the requirements of the EIS statute. Although the analysis completed by the consultant is more complete, this section may serve as a more accessible summary.

This rulemaking could affect ADEQ, political subdivisions, public and private entities who wish to obtain an AZPDES permit for a discharge to a listed surface water, public and private entities who may need to operate under and AZPDES general permit, and public and private laboratories that test for permit compliance. It will also create health, social, and economic benefits to the general public from access to clean water and protection of fish and wildlife.

The AZPDES permitting program is implemented by ADEQ through various general and individual permits. Individual permit holders can include public and private WWTPs, publicly owned treatment works (POTW), fish hatcheries, power plants, mines, truck stops, drinking water plants, marinas, and Water Quality Assurance Revolving Fund (WQARF) remediation projects. Because the WQS adopted in Article 1 of this rulemaking are already in effect, and there are planned of current discharges to any waters listed in Article 2, ADEQ expects the costs of adopting this rulemaking to be extremely low. Nonetheless, based on the information above, ADEQ has identified the following list of potential affected parties:

State and local government agencies

ADEQ,

Agencies operating under individual or general AZPDES permits

Political subdivisions

Political subdivisions generally, public WWTPs, POTWs, public laboratories Non-WWTP

government entities operating under AZPDES individual permits Non-WWTP

government entities operating under AZPDES general permits

Privately-Owned Businesses

Private entities operating under general permits Private, non-WWTP individual permit holders

Private WWTPs

Private laboratories

The General Public

D. Cost/Benefit analysis:

Cost and Benefit Factors	Class 1 - sky island stream - Cochise Stonghold Cyn.	Class 2 - isolated lake - Pintail Lake & marshes	Class 3 - unique waterbody - Quitobaquito Pond
Size (acres or acre-equivalents (Class 1))	21.76	65.00	0.50
Forested?	Yes	Yes	No
Costs and benefits over a 20-yr. period, discounted			
Costs			
404 permits	\$9,344	\$9,344	\$9,344
Mitigation			
ADEQ Admin	\$62,641	\$111,067	\$74,938
Total	\$71,985	\$120,411	\$84,282
Benefits, from willingness-to-pay (WTP) factors			
Local	\$5,509,181	\$7,840,675	\$3,151
Non-local	\$8,635,112	\$54,780,036	\$4,066
Total	\$14,144,293	\$62,620,711	\$7,216
Arizona component	\$14,982,646	\$68,136,424	\$8,045
Benefit/cost comparison			
Total benefits, Arizona	\$14,982,646	\$68,136,424	\$8,045
Total costs	\$71,985	\$120,411	\$84,282
Benefits/costs (first number in ratio: __ to 1)	208.1	565.9	0.10

The costs/benefits for each of these potentially affected parties is listed below. Use the following key to decipher the range of costs:

Minimal	Moderate	Substantial	Significant
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\$10,000 or less	\$10,001 to \$1,000,000	\$1,000,001 or more	Cost/Burden cannot be calculated, but the Department expects it to be important to the analysis.
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Description of Affected Groups	Description of Effect	Increased Cost/ Decreased Revenue	Decreased Cost/ Increased Revenue
ADEQ	Possible increase in number of surface waters identified as impaired and corresponding changes in 303(d) listings and TMDLs.	Minimal	
	Improved implementation and enforcement of the SWQS	Minimal	
	Administrative costs associated with future rulemakings	Significant	
	Predictability, reduced transaction costs, and responsiveness to stakeholders from avoiding federally-promulgated SWQS.		Minimal
	Compliance with state and federal law.		Minimal
	Support of ADEQ's mission to protect and enhance public health and the environment.		Substantial
Political subdivisions generally	Tax revenues and indirect benefits of clean water dependent industries (including outdoor recreation, tourism, etc.)		Cumulatively substantial
Public WWTP and/ or POTW	Increased monitoring costs	Minimal	
	Evaluation of compliance with standards	Minimal	
	Cost of compliance with new WQS	Minimal	
	Improved implementation and enforcement of water quality standards by political subdivisions with pretreatment programs.		
	Clarification and correction of errors.		Moderate
Public	Testing for WQS with accompanying costs.	Minimal	

laboratories			
Non-WWTP Government entities	Clarification and correction of errors. Cost of compliance with new WQS.	Minimal	Significant
Private entities operating under general permits	Clarification and correction of errors. Cost of compliance with new SWQS.	Minimal	Significant
Private WWTP	Clarification and correction of errors. Cost of compliance with new SWQS		Significant
Laboratories	Clarification and correction of errors. Testing for new SWQS with accompanying costs.	Minimal	Significant
General Public	Economic and social benefits of clean water		Cumulatively substantial
Non-WWTP individual permit holders (Power Plants, Mines, Marinas, etc.)	Clarification and correction of errors. Cost of compliance with new SWQS.	Minimal, if any	Significant

E. A general description of the probably impact on private and public employment in business agencies, and political subdivisions of this state directly affected by the rulemaking:

ADEQ estimates that this rulemaking will not have an impact on public or private employment. To the best of ADEQ's knowledge, the agency does not believe that any of the rule contained in this rulemaking package will result in a private or public entity needed an AZPDES permit.

F. A statement of the probably impact of the rules on small business:

The agency uses the term "small business" consistent with A.R.S. § 41-1001(21) which defines a "small business" as a concern, including its affiliates, which is independently owned and operated, which is not dominant in its field and which employs fewer than one hundred full-time employees or which had gross annual receipts of less than four million dollars in its last fiscal year.

1. An identification of the small business subject to the rules.

Among the stakeholders listed above, many could meet the A.R.S. § 41-1001(21) definition of small business. For example, a WWTP that would potentially discharge to a non-WOTUS protected surface water could be affected by this rule. In its current form, ADEQ cannot identify any small businesses that will be negatively affected by this rulemaking. Conversely, some small businesses may see some benefit in the clarification of WOTUS status of some waters and a clarification of what standards apply to those waters. Some recreational tourism related group may also see benefits from this rulemaking.

2. The administrative and other costs required for compliance with the rules:

Any potential compliance costs associated with this rulemaking would be based on the stakeholder involved. ADEQ's examination of those costs is addressed in the matrix above and the consultant's report.

3. A description of the methods that the agency may use to reduce the impact on small businesses, as required in A.R.S. § 41-1035.

In the event that a small business must acquire an AZPDES permit for a discharge to a non-WOTUS protected surface water, ADEQ has adopted water quality standards that allow ADEQ to establish variances, site-specific standards, or account for natural background pollutants when designing the permit.

4. The probable costs and benefits to private persons and consumers who are directly affected by the rules:

ADEQ's economic consultants prepared an executive summary which address the probable costs/benefits of and individual affected by these rules.

G. A statement of the probable effect on state revenues.

This rule should have a di minimus effect on state revenues.

H. A description of any less instructive or less costly alternative methods of achieving the purpose of this rulemaking:

ADEQ continually reviews and revises its WQS. These standards are adopted to protect public health or welfare and enhance the quality of water in the state. This means that WQS should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water

and take into consideration the use and value of water for public water supplies, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.

EPA will review ADEQ's Article 1 WQS to determine if they are consistent with the requirements of the CWA. If EPA determines that ADEQ's SWQS do not meet the requirements of the CWA, EPA will disapprove ADEQ's SWQS and promulgate federal standards. ADEQ has, therefore, developed the proposed WQS to comply with federal and state law, and to avoid federally promulgated WQS. Additionally, water quality criteria must be based on sound scientific rationale to protect the designated use, and not economic considerations. ADEQ is not aware of any less intrusive or less costly alternative methods that would meet ADEQ's legal obligations.

I. A description of any data on which the rule is based with a detailed explanation of how the data was obtained and why the data is acceptable data.

ADEQ recommends that interested stakeholder review ADEQ's Arizona Water Quality Standards technical paper for additional information about how data for calculating water quality standards is obtained. The paper can be accessed here: https://static.azdeq.gov/wqd/swpp/wqs_tp.pdf.

For information regarding ADEQ's economic analysis, ADEQ recommends that interested stakeholder review the consultant's final report and ADEQ's technical paper describing it. ADEQ's technical paper is available here: https://static.azdeq.gov/wqd/swpp/ese_tp.pdf and a copy of the consultant report is available here: https://static.azdeq.gov/wqd/swpp/ese_report.pdf.

10. A description of any changes between the proposed rulemaking, to include supplemental notices, and the final rulemaking:

ADEQ has modified this rule during the notice and comment process to provide additional clarity on the restrictions that must be present in any AZPDES permit for a discharge to a non-WOTUS protected surface water.

11. An agency's summary of the public or stakeholder comments made about the rulemaking and the agency response to the comments:

During this rulemaking commentors asked for a change in language that would provide more clarity about potential permitting actions. Specifically, a comment stating the following was received:

"Because ADEQ intends to utilize the existing AZPDES permit program (with some changes mandated by statute) to develop and issue point source discharge permits for discharges to non-WOTUS protected surface waters, the Department has not proposed new permitting regulations. Instead, it has proposed modifying A.A.C. R18-9-A903 to add language stating that AZPDES permits for discharges to non-WOTUS protected surface

waters should not include conditions that violate the restrictions of A.R.S. § 49-255.04.

[Stakeholder] supports the intention of this change, but believes additional clarity is required regarding the scope of AZPDES permits for discharges to non-WOTUS protected surface waters. Specifically, some of the prohibitions listed in A.A.C. R18-9-A903 may not “violate the restrictions of” A.R.S. § 49-255.04, but they nevertheless are not appropriate for consideration when issuing an AZPDES permit for a discharge to a non-WOTUS protected surface water. Yet, as the language is proposed, it is possible that some of these prohibitions could be applied when issuing permits for discharges to non-WOTUS protected surface waters.”

ADEQ Response: ADEQ has modified the language in this rulemaking to address the stakeholder's concerns.

12. All agencies shall list other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:

None.

a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:

ADEQ's regulations do allow for general permits for many different types of facilities, but not all facilities qualify for general permits. In the case that a general permit does not apply this rule may require that entities that discharge to non-WOTUS protected surface water apply for an individual AZPDES permit. Requirements for discharge vary depending on the facility, so many of these discharges would not be able to receive coverage under a general permit.

b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:

The Clean Water Act and implementing regulations adopted by EPA apply to the subject of this rule, as described in Section 5 above. Article 2 of this rulemaking establishes water quality standards that are applicable to surface waters that are not protected under the Clean Water Act. These standards are not more stringent than those the standards implemented by federal law, but they apply to waters that may not be protected under federal law.

ADEQ was given explicit statutory authority to develop a program to protect these surface waters by HB2691(2021). That bill is codified at A.R.S. §§ 49-202.01, 49-221, 49-255.04, and 49-255.05.

c. Whether a person submitted an analysis to the agency that compares the rule's impact of the

competitiveness of business in this state to the impact on business in other states:

No such analysis was submitted.

13. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rules:

No such material shall be incorporated by reference.

14. Whether the rule was previously made, amended or repealed as an emergency rule. If so, cite the notice published in the *Register* as specified in R1-1-409(A). Also, the agency shall state where the text was changed between the emergency and the final rulemaking packages:

Not applicable.

15. The full text of the rules follows:

CHAPTER 9. DEPARTMENT OF ENVIRONMENTAL QUALITY – WATER POLLUTION CONTROL

ARTICLE 9. ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM

PART A. GENERAL REQUIREMENTS

Section

R18-9-A903. Prohibitions

ARTICLE 9. ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM

PART A. GENERAL REQUIRMENTS

R18-9-A903. Prohibitions

A. The Director shall not issue a permit for a discharge to a WOTUS:

1. If the conditions of the permit do not provide for compliance with the applicable requirements of A.R.S. Title 49, Chapter 2, Article 3.1; 18 A.A.C. 9, Articles 9 and 10; and the Clean Water Act;
2. Before resolution of an EPA objection to a draft or proposed permit under R18-9-A908(C);
3. If the imposition of conditions cannot ensure compliance with the applicable water quality requirements from Arizona or an affected state or tribe, or a federally promulgated water quality standard under 40 CFR 131.31;
4. If in the judgment of the Secretary of the U.S. Army, acting through the Chief of Engineers, the discharge will substantially impair anchorage and navigation in or on any navigable water;
5. For the discharge of any radiological, chemical, or biological warfare agent, or high-level radioactive waste;
6. For any discharge inconsistent with a plan or plan amendment approved under section 208(b) of the Clean Water Act (33 U.S.C. 1288); and
7. To a new source or a new discharger if the discharge from its construction or operation will cause or contribute to the violation of a water quality standard. The owner or operator of a new source or new discharger proposing to discharge into a water segment that does not meet water quality standards or is not expected to meet those standards even after the application of the effluent limitations required under R18-9-A905(A)(8), and for which the Department has performed a wasteload allocation for the proposed discharge, shall demonstrate before the close of the public comment period that:
 - a. There are sufficient remaining wasteload allocations to allow for the discharge, and
 - b. The existing dischargers into the segment are subject to schedules of compliance designed to bring the segment into compliance with water quality standards.

- B. The Director shall not issue a permit for a discharge to a non-WOTUS protected surface water:
1. If the permit or the conditions of the permit violate the restrictions listed in A.R.S. §49-255.04; and
 2. If the conditions of the permit do not provide for compliance with 18 A.A.C. 11, Article 2 and the applicable requirements of 18 A.A.C. 9, Article 9.